NO. 19-_____

In the Supreme Court of the United States

UNITED STATES OF AMERICA, EX REL.
LAURENCE SCHNEIDER, ET AL.
AND LAURENCE SCHNEIDER,

Petitioners,

v.

JPMORGAN CHASE BANK,
NATIONAL ASSOCIATION, ET AL.,

Respondents.

On a Petition for Writ of Certiorari to the
United States Court of Appeals for the D.C. Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Court of Appeals for the District of Columbia Circuit affirmed the district court's decision granting the Government's motion to dismiss this action pursuant to the False Claims Act ("FCA"), 31 U.S.C. § 3730(c)(2)(A). In doing so the D.C. Circuit described a split among the circuits regarding their treatment of such motions by the Government.

The order specifically stated The False Claims Act "give[s] the government an unfettered right to dismiss [a *qui tam*] action," citing *Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003). The order also stated that the D.C. Circuit "declined to adopt the standard of the Ninth Circuit, under which the Government must initially show that dismissal is 'rationally related to a valid purpose,' after which the relator bears the burden to show the decision to dismiss is 'fraudulent, illegal, or arbitrary and capricious.'" citing *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998)). (App.2a)

THUS, THE QUESTION PRESENTED IS:

Whether the Government is entitled to absolute deference regarding its decision to dismiss an FCA action under section 3730(c)(2)(A), or whether the *qui tam* relator should be granted the right to demonstrate that the Government's rationale for dismissal is "fraudulent, illegal, or arbitrary and capricious."

LIST OF PARTIES

PETITIONERS AND PLAINTIFFS-APPELLANTS BELOW

United States of America, ex rel. Laurence Schneider

Laurence Schneider

RESPONDENTS AND DEFENDANTS-APPELLEES BELOW

JPMorgan Chase Bank, National Association

JP Morgan Chase & Co.

Chase Home Finance, LLC

RESPONDENTS AND INTERESTED PARTY-APPELLEE BELOW

United States of America

LIST OF PROCEEDINGS BELOW

United States District Court District of South Carolina

Civil Action No. 3:13-1223-CMC

United States of America ex rel. Laurence Schneider v. JP Morgan Chase Bank National Association; JP Morgan Chase & Company; Chase Home Finance LLC

Date of Order to Transfer: June 19, 2014

United States District Court for the District of Columbia

Civil Action No. 1:14-CV-01047-RMC

United States of America ex rel. Laurence *Schneider v. JP Morgan Chase Bank National Association; JP Morgan Chase & Company; Chase Home Finance LLC*

Date of Order on Motion to Dismiss:
December 22, 2016

United States Court of Appeals for the District of Columbia Circuit

No. 17-7003

United States of America ex rel. Laurence Schneider v. JP Morgan Chase Bank National Association; JP Morgan Chase & Company; Chase Home Finance LLC

Date of Judgment: December 22, 2017

United States District Court for the District of Columbia

Civil Action No. 1:14-CV-01047-RMC

United States of America ex rel. Laurence Schneider v. JP Morgan Chase Bank National Association; JP Morgan Chase & Company; Chase Home Finance LLC

Date of Order on United States' Motion to Dismiss: March 6, 2019

United States Court of Appeals for the District of Columbia Circuit

No. 19-7025

United States of America ex rel. Laurence Schneider v. JP Morgan Chase Bank National Association; JP Morgan Chase & Company; Chase Home Finance LLC

Date of Order on Summary Affirmance: August 22, 2019

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The opinion of the Court of Appeals for the District of Columbia Circuit (App.1a) is unreported, but available at 2019 WL 4566462. The decision of the district court is unreported but available at 2019 WL 1060876. (App.3a) Previous decisions related to an earlier stage of this litigation are reported at 878 F.3d 309, and 224 F.Supp.3d 48.

JURISDICTION

The order of the Court of Appeals for the District of Columbia Circuit was entered on August 22, 2019. (App.1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the False Claims Act, 31 U.S.C. §§ 3729-3731, are set out in the appendix to this petition at App.10a.

STATEMENT OF THE CASE

A. Introduction

This petition presents the question of the appropriate judicial review of a decision by the Government to seek dismissal of a False Claims Act ("FCA") complaint filed by a relator pursuant to 31 U.S.C. § 3730(c)(2)(A). Section 3730(c)(2)(A) provides:

> The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

The courts of appeal have set out two distinct and different standards for such review. The Ninth and Tenth Circuits have adopted a "two-step analysis . . . to test the [Government's] justification for dismissal: (1) identification of a valid Government purpose; and (2) a rational relation between dismissal and accomplishment of the purpose. If the United States satisfies the two-step test, the burden switches to the relator to demonstrate that the dismissal is fraudulent, arbitrary and capricious, or illegal." *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139 at 1145; *see also*, *Ridenour v. KaiserHill Co., L.L.C.*, 397 F.3d 925, 936 (10th Cir. 2005).

The D.C. Circuit has adopted a stricter standard that effectively gives the Government complete freedom to dismiss FCA cases under § 3730(c)(2)(A). It has

held that § 3730(c)(2)(A) "give[s] the government an unfettered right to dismiss an action," rendering the government's decision to dismiss essentially "unreviewable." *Swift v. United States*, 318 F.3d 250, 252; *see also Hoyte v. Am. Nat'l Red Cross*, 518 F.3d 61, 65 (D.C. Cir. 2008). In the D.C. Circuit the only exception to "section 3730(c)(2)(A)—if there are any—must be like "'fraud on the court.'" *Hoyte*, 518 F. 3d at 65 (*citing Swift*, 318 F.3d at 253). The only purpose of the mandated hearing is to afford the relator "a formal opportunity to convince the government not to end the case." *Swift*, 318 F.3d at 253.

This Petition seeks a resolution of these conflicting views.

B. Procedural History

On May 6, 2013, Petitioner/Relator Laurence Schneider filed a complaint under the FCA against Defendants J.P. Morgan Chase Bank, N. A., and J.P. Morgan Chase & Co. (collectively, "Chase") in the U.S. District Court for the District of South Carolina. *See* R.1. The complaint alleged that Chase had submitted false certifications of compliance with the National Mortgage Settlement Agreement ("NMS"). On January 13, 2014, the United States declined to intervene in Relator's initial complaint. R.24. On June 19, 2014, pursuant to Relator's request, the case was transferred to the U.S. District Court for the District of Columbia and specifically Judge Collyer, who had presided over the set of cases the led to the NMS, which was an action brought by the United States and several States against Chase. *See* R.58;

On November 17, 2014, Schneider filed his first amended complaint adding new claims to this action alleging additional certifications of compliance with the Housing Affordable Modification Program ("HAMP") R.80. On August 31, 2015, the United States declined to intervene in Relator's first amended complaint. *See* R.96. On October 2, 2015, Relator filed a second amended complaint, which corrected certain errors and added certain additional information that had come to Relator's attention since he had filed his first amended complaint. R.102. On November 12, 2015, Chase filed a motion to dismiss both of the counts of Schneider's complaint. R.105.

The District Court dismissed Relator's second amended complaint in full on December 22, 2016, with prejudice as to the NMS claims for failure to exhaust contractual remedies and without prejudice as to the HAMP claims. R.118. *United States ex rel. Schneider v. J.P. Morgan Chase Bank, N.A.*, 224 F. Supp. 3d 48, 61-62 (D.D.C. 2016). Relator appealed this decision and the United States participated as amicus curiae regarding the District Court's ruling on Schneider's need to exhaust contractual remedies before filing a *qui tam* action on the NMS claims. On December 22, 2017, the D.C. Circuit, while agreeing with the Relator as to his argument on the District Court's decision, affirmed the dismissal with prejudice of the NMS Claims on alternative grounds and affirmed the dismissal without prejudice of the HAMP claims. *United States ex rel. Schneider v. J.P. Morgan Chase, N.A.*, Appeal No. 17-7003, 878 F.3d 309, 314-15 (D.C. Cir. 2017) (Justice Kavanaugh participating on the panel).

On remand, Relator sought leave to file a third amended complaint to revive his HAMP Claims ("TAC") (R.125) (App.57a), which Chase opposed. (R.126). After briefing concluded on Chase's motion to dismiss, the United States informed the District Court and the parties that it was evaluating whether to seek dismissal under § 3730(c)(2)(A). R.130. On November 13, 2018, the United States moved to dismiss the action. R.135. (App.50a) Schneider requested a hearing as provided for by the statute, R.136, and, after the hearing, the District Court granted the United States' motion to dismiss. *United States ex rel. Schneider v. JP Morgan Chase, N.A.*, 2019 WL 1060876 (D.D.C. Mar. 6, 2019). (App.3a) The District Court held that it was bound by the D.C. Circuit's previous decisions in *Swift* and *Hoyte*. In rendering its decision, the District Court did not address Schneider's legal or factual arguments demonstrating that the Government's motion to dismiss was arbitrary and capricious.

Schneider timely filed a notice of appeal of the district court's decision on April 1, 2019. On March 23, 2019, the Government filed a motion for summary affirmance based on the decisions in *Swift* and *Hoyte.* Schneider filed an opposition to the Government's motion for summary affirmance and motion for affirmative relief on June 21, 2019. Schneider's motion for affirmative relief contained legal argument and substantial evidence showing that the Government's motion was arbitrary and capricious. Citing *Swift* and *Hoyte*, the D.C. Circuit granted the Government's motion in a one-page order, which did not address Schneider's legal and factual arguments.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE SPLIT ON THE APPROPRIATE REVIEW OF GOVERNMENT DISMISSALS OF WHISTLEBLOWER FALSE CLAIMS CASES.

It is important for the Court to grant this petition to resolve the conflict between the circuits regarding the appropriate review of § 3730(c)(2)(A) dismissals, because of the increased use of this provision by the Government within the last two years. This increased usage was prompted by an internal memorandum issued by Michael D. Granston, Director, Commercial Litigation Branch, Fraud Section, addressed to his staff and Assistant U.S. Attorneys handling false claims act cases, dated January 10, 2018, the Department of Justice set out a new policy for seeking dismissal of FCA cases under 31 U.S.C. § 3730(c)(2)(A). ("Granston Memorandum") (App.121a) (This memorandum, labeled "Privileged and Confidential," is widely available on the internet, *see e.g.* https://assets.documentcloud.org/documents/4358602/Memo-for-Evaluating-Dismissal-Pursuant-to-31-U-S.pdf.) The memorandum sets out seven factors for seeking a dismissal: (1) Curbing Meritless Qui Tams; (2) Preventing Parasitic or Opportunistic Qui Tam Actions; (3) Preventing Interference with Agency Policies and Programs; (4) Controlling Litigation Brought on Behalf of the United States; (5) Safeguarding Classified Information and National Security Interests; (6) Preserving Government Resources; and (7) Addressing Egregious Procedural Errors.

While setting out factors internally to justify dismissing FCA actions, the government seeks to avoid giving any reasons to the relator and the courts for its section 3730(c)(2)(A) dismissals. Instead, it seeks now to rely on the logic of the *Swift* and *Hoyte* decisions which grant the government "unfettered" discretion to dismiss cases.

The decisions of the D.C. Circuit stand in contrast to those of the Ninth and Tenth Circuits in *Sequoia Orange* and *Ridenour* where the courts have adopted a "two-step analysis . . . to test the [Government's] justification for dismissal: (1) identification of a valid Government purpose; and (2) a rational relation between dismissal and accomplishment of the purpose. If the United States satisfies the two-step test, the burden switches to the relator to demonstrate that the dismissal is fraudulent, arbitrary and capricious, or illegal." *Sequoia Orange Co.*, 151 F.3d at 1145. While the *Sequoia Orange* standard requires the Government to provide a justification for its dismissals of FCA actions, ultimately the burden is on the relator to show that the dismissal is not warranted.

II. THE STANDARD ESTABLISHED BY THE NINTH CIRCUIT FOR SECTION 3730(C)(2)(A) DISMISSALS IS CONSISTENT WITH THE FALSE CLAIMS ACT.

This Court has long held, in interpreting a law enacted by Congress: "we start, as always, with the language of the statute." *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 668 (2008). And "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . "*Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (citations and quotations omit-

ted). Section 3730(c)(2)(A) "mandates a hearing before a court may dismiss a *qui tam* action over a relator's objection." *United States v. EMD Serono, Inc.*, 370 F. Supp. 3d 483, 488 (E.D. Pa. Apr. 3, 2019). Section (c)(2) provides no express standard for evaluating a motion to dismiss, leaving that question to the courts. Although the government argues that it must have nearly unfettered discretion to dismiss, "[r]educing the hearing requirement to insignificance" would violate "a basic canon of statutory construction." *Id.* "[I]t would be superfluous for Congress to require a hearing . . . if the court's only role were to sit idly by as the relator attempts to persuade the Government not to dismiss the action." *United States ex rel. Nasuti v. Savage Farms*, 2014 U.S. Dist. LEXIS 40939, *30 (D. Mass. Mar. 7, 2014). Even the D.C. Circuit recognized when analyzing a complementary provision of the FCA, 31 U.S.C. § 3730(c)(2)(B), dealing with the requirement for a hearing to assess the fairness of a settlement:

> [A]llowing dismissal without judicial review of the settlement would render § 3730(c)(2)(B) a nullity and thus contravene "the longstanding canon of statutory construction that terms in a statute should not be construed so as to render any provision of that statute meaningless or superfluous." *Beck v. Prupis*, 529 U.S. 494, 506, 120 S.Ct. 1608, 146 L.Ed.2d 561 (2000); *see also Abourezk v. Reagan*, 785 F.2d 1043, 1054 (D.C. Cir.1986).

United States ex rel. Schwelzer v. Onc N.V., 677 F. 3d 1228, 1234 (D.C. Cir. 2012).

To determine the appropriate standard for judicial review of government motions to dismiss *qui tam* actions, the court in *Sequoia Orange* looked to the structure of the statute, which supports a meaningful role for *qui tam* relators. The FCA provides that *qui tam* relators have all the rights of a party in intervened actions: the right to conduct actions after the government declines; the right to object to the fairness, adequacy, and reasonableness of settlements; and the right to a hearing on dismissals initiated over their objection. 31 U.S.C. § 3730, *et seq.* Together, these provisions reflect a significant role for relators in enforcing the FCA that is inconsistent with the absence of any meaningful review of a government motion to dismiss a *qui tam* case.

The Senate Report accompanying the 1986 Amendments to the FCA also supports the 9th Circuit's *Sequoia Orange* test. The report describes the check on the government's ability to dismiss a case as something more than a stopgap for egregious abuse by individual government officials. The report reflects the congressional intent to "provide[ ] qui tam plaintiffs with a more direct role . . . in acting as a check that the Government does not neglect evidence, cause undue delay, or drop the false claims case without legitimate reason." *Sequoia Orange,* 151 F.3d at 1144-45, *quoting* S. Rep. No. 99-345 at 25-26 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291.

The introductory paragraph in the Senate Report concerning Section 3730 states:

> Subsection (c)(1) provides *qui tam* plaintiffs with a more direct role not only in keeping abreast of the Government's efforts and pro-

> tecting his financial stake, but also in acting as a check that the Government does not neglect evidence, cause unduly delay, or drop the false claims case without legitimate reason. Specifically, paragraph (1) provides that when the Government takes over a privately initiated action, the individual who brought the suit will be served, upon request, with copies of all pleadings filed as well as deposition transcripts. Additionally, the person who brought the action may formally object to any motions to dismiss or proposed settlements between the Government and the defendant.

S. Rep. 99-345 at 25-26.

Although the Report goes on to address a standard for a petition by a relator for an evidentiary hearing (*id.* at 26, "evidentiary hearings should be granted . . . if the relator presents a colorable claim that the settlement or dismissal is unreasonable in light of existing evidence, that the Government has not fully investigated the allegations, or that the Government's decision was based on arbitrary and improper considerations"), that Congress ultimately made the hearing mandatory does not obviate the legislative concerns reflected in the Senate Report.

As noted by other courts in adopting the Ninth Circuit test:

> "The rational relationship test strikes a balance among the branches of government. It does not give unlimited power to the Executive to dismiss a legitimate action the Legislature created. Nor does it give the

> Judicial Branch unrestrained power to stop the Executive from acting to dismiss an action in the government's interest. Requiring the Executive to give a reason for a decision to dismiss a qui tam action the Legislature intended to be pursued is consistent with the notion of independent, co-equal branches of government."

United States ex rel. Cimznhca, LLC v. UCB, Inc., 2019 WL 1598109 *3 (S.D. Ill. April 15, 2019) quoting *United States ex rel. SMSPF, LLC. v. EMD Serono, Inc.,* 2019 WL 1468934 *4 (E.D. Pa. April 3, 2019).

Following this standard, a district court in the Ninth Circuit recently denied the Government's motion to dismiss under section 3730(c)(2)(A). *United States ex rel. Thrower v. Academy Mortgage Corp.,* 2018 WL 3208157 (N.D. Cal. June 29, 2018) (appeal filed *United States v. Academy Mortgage Corp.*, No. 18-16408 (9th Cir.)). Similarly, the court in *Cimznhca* denied the Government's motion to dismiss after finding that its rationale for dismissal was arbitrary and capricious. 2019 WL 1598109 at *4.

III. THE GOVERNMENT'S MOTION TO DISMISS IS ARBITRARY AND CAPRICIOUS.

The Government asserted in its motion to dismiss submitted to the district court that it relied on two of *Granston* factors. It asserted that Schneider's claim lacked merit and that there was a need to preserve Government resources. Given the status of Schneider's litigation against Chase at that time, neither of these assertions withstands any level of reasonable scrutiny. Since the Government has set

out a standard to determine when to seek dismissal of a case under section 3730(c)(2)(A), the court should use that standard to determine whether the Government's motion is arbitrary and capricious.

Most of the allegations in Schneider's complaint centered around Chase's failure to continue to service loans that had charged off because those loans were no longer performing. Those loans had been taken out of its normal system of records and placed in a pool of loans called "Recovery One" ("RCV1"). As alleged in the TAC, the failure to service these loans is a violation of the HAMP.

The totality of the Government's analysis of the TAC is contained in one paragraph:

> In his TAC, Relator alleges that Chase violated the FCA by submitting claims for HAMP incentive payments that were false because Chase failed to adhere to HAMP servicing standards. *See generally* TAC ¶ 1. Specifically, Relator alleges that Chase failed to solicit properly borrowers for HAMP modifications and perform other HAMP servicing obligations for loans that Chase charged-off for accounting purposes and placed onto its "Recovery One" loan platform. *See* TAC ¶ 20. Notwithstanding these alleged violations, Relator alleges that Chase submitted annual certifications with the HAMP compliance agent attesting to Chase's compliance with program rules. *See* TAC ¶¶ 195-201. Notably, Relator does not allege that Chase received HAMP incentive payments on loans migrated onto Recovery One. *See*

> *generally* TAC. Additionally, Relator concedes that Chase released liens on loans in Recovery One (*id.* ¶ 18), which eliminated any chance of Chase foreclosing on a defaulting homeowner because the mortgage was no longer secured by the property.

United States' Motion to Dismiss at 3, R. 135. (App.53a)

This paragraph contains two statements that appear to be the basis of the Government's conclusion that Schneider's FCA case lacks merit. The first is that "Relator does not allege that Chase received HAMP incentive payments on loans migrated onto Recovery One."[1] However, the identification of specific loans that did not meet the requirement for HAMP payments is not necessary for demonstrating that Chase was not eligible for any HAMP payments. The second statement that "Relator concedes that Chase released liens on loans in Recovery One (*id.* ¶ 18), which eliminated any chance of Chase foreclosing on a defaulting homeowner because the mortgage was no longer secured by the property" is irrelevant to the issues of this case. As explained in the TAC at ¶¶ 106-110, releasing liens was a necessary, but not

[1] Schneider filed a separate action in the Southern District of New York seeking damages and other relief, *Mortgage Resolution Servicing, LLC, et al. v. JPMorgan Chase Bank, N.A., et al.*, No. 1:15-cv-00293-LTS (S.D.N.Y. Dec. 24, 2014), in which Chase produced voluminous discovery. After the Government filed its motion to dismiss, Schneider found in that discovery a document that describes the volume and value of incentive payments Chase received under the HAMP for extinguishment of second liens contained in RCV1. This information was provided separately to the Government along with the evidence that these values are for HAMP incentive payments.

a sufficient, condition for Chase to avoid the requirements of the HAMP. Chase also had to release the underlying debt and notify the borrowers. *MHA Handbook v. 4.0* at 60. (App.166a) For most of the charged-off loans where Chase released the lien, it failed to also release the underlying debt and notify the borrower. This failure was not a simple error, but instead, it was an intentional bank policy that enabled Chase to continue efforts to collect on the debt even though it was on longer secured by the lien. Thus, these loans were still subject to the requirements of the HAMP.

IV. CHASE VIOLATED THE CONDITIONS FOR PAYMENT UNDER THE HAMP BY FAILING TO MEET THE SERVICING AND LOAN MODIFICATION REQUIREMENTS OF THE HAMP FOR LOANS IN RCV1.

The HAMP created two separate but necessary conditions for payment under the HAMP. The first is that the servicer was required to follow the HAMP loan modification procedures for each loan for which the servicer claimed credit. The second condition is that Chase had to certify that it was in overall compliance with the HAMP servicing and loan modification requirements of the HAMP. The Government is correct that Schneider did not allege any specific loan that did not qualify for an incentive payment under the HAMP. The Government's argument is misleading since Schneider's case is not limited to invalidating the payments made for a few loans. Schneider alleged that Chase could not certify that any of its loans that had been moved to RCV1 could meet the requirements of the HAMP. Since the loans that were in RCVI were subject to the HAMP,

all of Chase's certifications of compliance with the servicing requirement of the HAMP were false.

The voluntary Servicer Participation Agreement ("SPA") that Chase signed contained two explicit statements that incentive payments under the HAMP were conditioned on meeting the overall servicing requirements of the HAMP. The first is contained in the basic agreement. It states:

> 4. Agreement to Purchase Financial Instrument: Payment of Purchase Price.
>
> B. The conditions precedent to the payment by Fannie Mae of the Purchase Price with respect to the Services described on the Initial Service Schedules are:
>
> * * *
>
> (d) the performance by Servicer of the Services described in the Agreement, in accordance with the terms and conditions thereof, to the reasonable satisfaction of Fannie Mae and Freddie Mac; and (e) the satisfaction by Servicer of such other obligations as are set forth in the Agreement.

Amended and Restated Commitment to Purchase Financial Instrument and Servicer Participation Agreement, ¶ 4.B. at 3 (emphasis added). (App.144a)

The "Financial Instrument" referred to above is part of the SPA and contains similar language requiring that servicers meet the servicing requirements of the HAMP as one of the conditions precedent to payment:

> (a) The conditions precedent to the payment by Fannie Mae of the Purchase Price with respect to the Services described on the Initial Service Schedules are:
>
> * * *
>
> (iv) the performance by Servicer of the Services described in the Agreement; and (v) the satisfaction by Servicer of such other obligations as are set forth in the Agreement. Servicer shall perform all Services in consideration for the Purchase Price in accordance with the terms and conditions of the Agreement, to the reasonable satisfaction of Fannie Mae and Freddie Mac.

SPA, Ex. B, Financial Instrument, § 1(a) (emphasis added) (App.149a)

Chase was required to certify that it was in compliance with the servicing terms of the Agreement on an annual basis. That requirement is completely unambiguous. Any other interpretation afforded it by the Government is arbitrary, unsupported anywhere in the agreements or policies, and a demonstrably erroneous basis for the Government's present action. This is further bolstered by the subsequent certifications, filed after the initial certification, which contained the following statements:

> 2. In connection with the Programs, Servicer is in material compliance with, and certifies that all Services have been materially performed in compliance with, all applicable Federal, state and local laws, regulations, regulatory guidance, statutes, ordinances, codes and requirements, including, but not

limited to, the Truth in Lending Act, 15 U.S.C. 1601 § et seq., the Home Ownership and Equity Protection Act, 15 U.S.C. § 1639, the Federal Trade Commission Act, 15 U.S.C. § 41 et seq., the Equal Credit Opportunity Act, 15 U.S.C. § 701 et seq., the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., the Fair Housing Act and other Federal and state laws designed to prevent unfair, discriminatory or predatory lending practices and all applicable laws governing tenant rights, bankruptcy, mediation and foreclosure. . . .

3. Servicer has materially complied with the following: (i) performed its obligations in accordance with the Agreement and in accordance with accepted servicing practices, and has promptly provided such performance reporting on the Programs as Fannie Mae and Federal Home Loan Mortgage Corporation, a federally chartered corporation, acting as compliance agent of the United States ("Freddie Mac") have reasonably required; (ii) all Services relating to benefits under the Programs available to eligible borrowers have been offered by Servicer to such borrowers, fully documented and administered by Servicer in accordance with the applicable Program Documentation then in effect; and (iii) all data, collection information and other information reported by Servicer to Fannie Mae and Freddie Mac under the Agreement, including, but not limited to, information that was relied upon by Fannie Mae and Freddie Mac in calculating the Purchase

Price and in performing any compliance review, was true, complete and accurate in all material respects, and consistent with all relevant business records of the Servicer, as and when provided or, if such information was provided from third parties, including borrowers or prior servicers, Servicer has no knowledge that such information is incorrect or incomplete at the time it was provided to Fannie Mae or Freddie Mac. Notwithstanding the above, Servicer may have inadvertently violated any of the above, but has taken or will take all necessary actions to rectify any such violation or lack of compliance.

4. Servicer has materially complied with the following: (i) performed the Services required under the Program Documentation and the Agreement in accordance with the practices, professional standards of care, and degree of attention used in a well-managed operation, and no less than that which the Servicer exercises for itself under similar circumstances; and (ii) used qualified individuals with suitable training, education, experience and skills to perform the Services. Servicer acknowledges that participation in the Programs required changes to, or the augmentation of, its systems, staffing and procedures. Servicer took all reasonable actions necessary to ensure that it had the capacity to implement the Programs in which it is participating in accordance with the Agreement.

> 5. Servicer acknowledges that the provision of false or misleading information to Fannie Mae or Freddie Mac in connection with the Programs or pursuant to the Agreement may constitute a violation of: (a) Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; or (b) the civil False Claims Act (31 U.S.C. §§ 3729-3733). Servicer has disclosed to Fannie Mae and Freddie Mac any credible evidence known to Servicer, in connection with the Services, that a management official, employee, or contractor of Servicer has committed, or may have committed, a violation of the referenced statutes.

TAC ¶ 23 (emphasis added) (App.65a)

There is no question that the certifications by the Servicer relating to compliance with servicing contained in the annual certifications are a condition precedent to the payment to the Servicer contained in the SPA regarding servicing.

The Government's insistence that Schneider identify individual loans that did not qualify for incentive payments is inexplicable. It represents a false limitation on the duties Chase was required to perform when the certifications focused on the banks' overall servicing practices. The Government was not paying incentives to Chase simply for it to modify individual loans and otherwise keep its bad practices intact. The Government was incentivizing Chase and the other Servicers to change their actions for the benefit of all their borrowers. Moreover, the position

taken by the Government in this case is contradicted by the position it has taken in analogous cases. *See e.g. United States ex rel. Longhi v. Lithium Power Tech. Inc.* 575 F.3d 458, 473 (5th Cir. 2009)(damages equaled the Government's total payments for falsely claiming eligibility for a Small Business Innovation Research program grant even though the delivered product met specifications); *United States v. Rogan,* 517 F.3d 449, 453 (7th Cir. 2008) ("The Government offers a subsidy . . . with conditions. When the conditions are not satisfied, nothing is due."). At the hearing on the motion to dismiss, the Government's counsel stated that he agreed with this analysis:

> On *Longhi*, the scope of *Longhi*, because I actually may agree one hundred percent with them on what *Longhi* stands for, in the theory of the implied, the theory of fraudulent inducement under the False Claims Act, we may be in complete accord on that.

Transcript 24: 13-17 (App.45a)

This admission by the Government demonstrates that one of the key justifications for seeking dismissal (that Schneider's allegations are without merit) is completely unjustified.

Therefore, since the Government agrees with Schneider's legal theory, and the amount at stake far exceeds any possible cost to the government in terms of resources used, there is no reasonable justification for dismissing this case. The Government obviously has other reasons for dismissing this case that our unrelated to the merits. The Government should be required to state those reasons, so that a court can

determine whether the rationale for dismissal is "fraudulent, illegal, or arbitrary and capricious."

V. THE GOVERNMENT WILL INCUR MINIMAL COSTS IN THIS LITIGATION COMPARED WITH THE POTENTIALLY HUGE RETURN TO THE TREASURY THAT THIS CASE REPRESENTS.

In its motion to dismiss the Government asserted that because of its view of the merits of the case, further litigation "would require further unnecessary expenditures of scarce Government resources. . . . " R. 135 at 5. The Granston Memorandum states "[t]he department should also consider dismissal under section 3730(c)(2)(A) when the Government's expected costs are likely to exceed any expected gain." The single damages in this case potentially exceed hundreds of millions of dollars. Whatever minimal resources the Government expends in monitoring this case are fully justified by the potential payoff in this meritorious case.

At the hearing on the motion to dismiss, the Government proffered a new reason for seeking dismissal related to cost. Government's counsel stated:

> [I]f this case were to proceed, large amounts of discovery from the Department of the Treasury because materiality would be at play and what treasury knew and when they knew it would be a centralized question in any false claims act case especially under the Supreme Court's test in [*Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016)].

Transcript at 24:18-23 (App.48a)

Essentially, the Government's justification for dismissing this action is concern that the defendant may propound discovery upon it. Thus, the Government admitted that it is being held hostage to the fear an aggressive defendant will cause it to do too much work or cause it to be embarrassed by an investigation into its performance in monitoring Chase's actions under the HAMP. Certainly, the avoidance of discovery is not a justification envisioned by Congress when it gave the Government the ability to dismiss under section 3730(c)(2)(A).

The cost to the Government of submitting to discovery or reading the filings in this case is infinitesimal compared to the millions it will receive if Schneider prevails. Schneider has himself expended millions of his own funds in his private action, which directly benefit this case. Instead of seeking dismissal of this case, the Government should permit Schneider to vindicate these violations to ensure a maximum recovery and prompt resolution of this case. Given the potential payoff compared with the minimal cost to the Government, using the cost to the Government as a justification for dismissing this case is indeed arbitrary and capricious, without any reasonable explanation for its decision.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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